No. 11858.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER MATEAS,

Appellee.

REPLY BRIEF OF APPELLANT FRED HARVEY, A CORPORATION.

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On re-reading Appellant's Opening Brief for the purpose of preparing this Brief, we observe that through inadvertence a formal Specification of Errors was omitted from the Opening Brief. We, therefore, respectfully ask permission of this Court to supply said Specifications of Errors herewith.

I.

Specification of Errors.

Appellant specifies as errors, requiring a reversal of the judgment in this case, the following:

Specification 1. Error upon the part of the trial court in admitting in evidence the testimony of the plain-

tiff with regard to a conversation not shown to have been within the hearing of any employee of the defendant, which conversation was that on the way down to Indian Gardens he and Mr. Boles spoke several times [120-121]; that Mr. Boles asked him if he had ever ridden before and appellee told him no; he had ridden burros when he was a child and nothing since then; that appellee asked Mr. Boles if he was an experienced rider; that Mr. Boles said he was practically born on a mule; that appellee told Mr. Boles he would like to get off his mule, but wouldn't expect Mr. Boles to exchange with him; that Mr. Boles assured him he could handle most anything [122].

The grounds of objection urged upon the trial were:

Appellee testified [119-120] that the guide Bob Ennis came along and told appellee that appellee was on the wrong mule [121]. Appellee was then asked whether either he or Mr. Boles said anything to the guide at that time. He answered:

> "A. Yes, sir. Mr. Boles and I spoke about it on the way down. We had some slight conversation to the effect that I was a green rider—
>
> Mr. Schell: Just a moment.
>
> A. —and he was an experienced rider."

Mr. Schell, counsel for appellant, then made the following motion [120]:

> "Mr. Schell: I move to strike out any conversation between this witness and Mr. Boles, without the presence of this defendant and hearsay."

The motion was overruled [120].

Appellee was then asked further questions with regard to the conversation with Mr. Boles, to which the following objections were made [120-121]:

> "Mr. Schell: May I have the same objection, your Honor, that it is incompetent, irrelevant and immaterial, hearsay, not within the issues, and would be purely hearsay, not part of the *res gestae*.
>
> The Court: Is that the same question you are just repeating?
>
> Mr. Lincoln: That is the same question; yes, sir.
>
> Mr. Schell: To keep the record straight, he has re-asked the question and I have to repeat my objection.
>
> The Court: Yes; I understand. Your objection will be overruled, and the evidence received for the limited purpose stated, namely, to show it was in fact said, and not the truth of what was said. You may relate the conversation."

Argument upon this specification is found under heading V of the Opening Brief, pages 10-15, and heading II of this brief.

Specification 2. Error upon the part of the trial court in admitting in evidence the testimony of Mrs. Vogel as to conversations which she heard between Mr. Mateas and Mr. Boles, which conversations were not shown to have been within the hearing of any employee of the defendant and were that Mr. Boles said "What is the matter with that ornery mule. Does he have a bee in his bonnet?"; that frequently Mr. Boles tried to give appellee advice as to how to handle the mule; and that Mr. Boles said maybe it would be better for appellee to get off and lead the mule [160-161].

Upon the asking of the first of the questions with regard to this conversation, the following objection was interposed [156]:

> "Mr. Schell: Just a moment. That is objected to, if the court please, as incompetent, irrelevant and immaterial, and pure hearsay in so far as this defendant is concerned.
>
> The Court: The question is merely directed to whether or not there was conversation. The objection is overruled. The answer may stand."

The objection was overruled.

Upon the asking of the next question with regard to said conversation, the following objections and statements were made [156-157]:

> "Mr. Schell: The same objection, your Honor.
>
> * * * * * * * *
>
> Mr. Schell: As to that, if the court please, it would not in any way be binding on these defendants, because it would be purely hearsay as to them."

The objection was overruled.

Upon the asking of the next question with regard to the conversation, the following objection was made [159]:

> "Mr. Schell: If the court please—might it be stipulated, counsel, that my objection goes to this entire line of conversation?"

The court then stated [159]:

> "The Court: Yes. Well, it is understood that your objection heretofore made goes to any part of the conversation that occurred outside of the presence of any representative of the defendant; and the

jury is to understand that any conversation that occurred outside of the presence of a representative of the defendant is admitted solely for the purpose of evidence of what was said, and not evidence as to the truth of what was said."

Argument upon this specification is found under heading V of the Opening Brief, pages 10-15, and heading II of this brief.

Specification 3. The court committed error in instructing the jury as follows [300]:

"The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

The objections made to the foregoing instruction were as follows [288]:

"Mr. Schell: I do not agree on the fact that the assumption of risk is necessarily limited or is not applicable to the acts of the defendant which the plaintiff should have known."

And again [290]:

"Mr. Schell: Well, possibly that is the distinction. But I think, once he knew that the risk was inherent or was there, and he continued to act, that is a question of fact whether or not he either assumed the risk or was guilty of contributory negligence."

And again [307-308]:

"Has the defendant any exceptions to note on the record with respect to the instructions thus far given?

Mr. Schell: No, your Honor, except the instruction on the—I don't remember whether it is necessary to note an exception on the instructions nowadays—but the instruction on the assumption of risk, as I pointed out before, I feel it was broader—in other words, he assumed any risk, even though that risk might have been caused by the defendant, provided that plaintiff knew.

The Court: That refers back to our discussion the other day?

Mr. Schell: That refers back to our discussion.

The Court: That an act or omission of the defendant might have gone on for a sufficient period of time back to prove the inherent risk of the enterprise?

Mr. Schell: That is correct.

The Court: And have been known, of course, to the plaintiff, or, in the exercise of due care, he should have known. That is your contention?

Mr. Schell: That is my contention, yes."

Argument upon this specification is found under heading VI of the Opening brief, pages 16-17, and under heading II of this Brief.

II.

Errors in the Admission of Evidence.

Appellee makes two claims with respect to the admission in evidence of the conversations between himself and Mr. Boles:

1. That no error was committed because the conversations took place within the hearing of the guide, an employee of appellant.

2. That apart from these conversations there was sufficient evidence to support the verdict of the jury and that, therefore, the reception of the evidence of these conversations was not prejudicial.

In fact, there is no evidence that these conversations were within the hearing of the guide, the only employee of appellant anywhere in the vicinity. Appellee's argument is merely that since he was deaf, he probably spoke in a loud voice and that as this was not a usual noise incident to the trip, the guide probably overheard what was said. This, however, is pure speculation. On the other hand, there is the testimony of Mr. Wilson that from the position of the guide at the head of the line, the guide could not have heard what was said between the riders of the two mules last in line [182-183].

When a conversation, in which a party to an action does not participate, is offered in evidence, the burden is upon the one so offering it to establish that it actually was heard or within the hearing of the adverse party.

Thus it is said in *22 C. J.* (Evidence), Section 358, p. 324:

> "The mere fact that the party was within hearing distance of the speaker, is not sufficient unless the

> situation was such that he must necessarily have heard."

In *Josephi v. Furnish,* 27 Ore. 260, 41 Pac. 424, 426, the Court said:

> "The subsequent questions herein noted as put to the witness Brown, and his answers thereto, were, therefore, incompetent, and ought not to have been admitted, and likewise other questions and answers of the same nature. The same observation will apply to the like character of testimony elicited from the witnesses Park and Carter. The conversation which Park relates that he had with Wilkinson took place within 12 feet of the plaintiff, but around the corner of a vault, and out of his sight, and Park could not swear that he did or could have heard the conversation. Hence plaintiff could not be bound by Wilkinson's admissions, unless it was shown that he heard them, and had an opportunity of correcting any statement inconsistent with the facts as they existed."

No witness testified that the guide either heard or even could have heard the conversations between appellee and Mr. Boles. Their admission in evidence was, therefore, error.

By far the greater portion of appellee's Brief is devoted to a statement of the evidence favorable to appellee's contentions, and appellee appears to criticize us for not having set forth this evidence in full in our Opening Brief.

It must be remembered that this appeal is not based upon the insufficiency of the evidence to sustain the verdict or judgment. We, therefore, confined our statement of facts to a summary of the evidence sufficient to show

two things: (1) That the conversation so admitted and the instruction given concerned vital issues in the case, namely, the conduct of the mule and of appellee, and (2) That there was a sharp conflict in the evidence on these issues.

The admission of incompetent evidence upon a vital issue on which there is a conflict is necessarily prejudicial since it may well be that it was this incompetent evidence which induced the jury to resolve that conflict one way or the other.

In addition to the cases cited by us on page 15 of our Opening Brief, we would refer the court on this point to the following authorities:

In *Anderson v. Hagen,* 19 Cal. App. (2d) 714, 726, 66 P. (2d) 168, 175, the court says:

> "The determinative issue at the trial was whether the stock had been pledged, as Anderson testified, or whether it had been endorsed, as Hagen stated, simply to make more expeditious a possible sale of Weber Company. Upon this issue Mrs. Hagen was called as a witness, although she had no part in the transaction with Anderson other than to endorse the certificate at her husband's direction, and over timely and proper objection she was permitted to testify, in response to the question: 'What was told you at the time that it was signed by you? . . . A. My husband handed it to me asked me to sign it and I asked him why he wanted me to, and he said Major wanted us to sign them, and he said that Major was worried about his affairs, and that he has plans in his head that probably that he might plan to sell to Cherry & Burrell and that was all I knew about those plans, and he said that he thought we should cooperate with Major and that we certainly could trust his

judgment, and I felt the same way about Major, and I signed it, and was perfectly happy to sign it.'

The question called for and received an answer which, on the matter in dispute, was clearly hearsay, a statement the purport of which was an explanation of the nature and purpose of the deposit of the stock. Because the evidence on this vital point was in direct conflict, the error of admitting this testimony cannot be said to be without prejudice."

Certainly the evidence received in the case at bar was just as incompetent as the evidence referred to in the cited case and, likewise, it cannot be said not to have resulted in prejudice to appellant.

In *Grace v. Carpenter,* 42 Cal. App. (2d) 301, 303, 108 P. (2d) 701, 702, the court says:

"It follows, therefore, that in an action such as the instant one evidence as to the husband's earnings and as to other community property, with the one possible exception above noted, would be irrelevant, and having been here received by the court it must be assumed that such evidence was taken into account in the court's determination of the issues involved. The error in admitting such evidence is necessarily prejudicial."

In our Opening Brief, page 14, we asked what was the materiality of what was said between Mr. Boles and appellee unless the saying thereof tendered to prove its truth. We further pointed out that whether or not appellee and Mr. Boles had a conversation before reaching Indian Gardens, was not itself a fact in issue, and that, therefore, the jury must have concluded that the evidence of these conversations tended to prove something beyond the mere

fact that they took place. We pointed out that the jury must, therefore, have understood that they were to give some weight to the conversations as tending to establish the conduct of the mule on the way down the trail.

Appellee's answer is found on pages 6 and 7 of the Reply Brief and consists of the statement that such an intelligent jury could not have received the impression that by admitting this evidence the Court intended to convey the idea that the evidence was material or tended to prove some fact in issue. Appellee, however, fails to state what other impression the jury could have received from the fact that, over objection, the trial court admitted the evidence. We submit that the one and only impression that the jury could possibly have received was that the evidence was material and did tend to prove a fact in issue, namely, the conduct of the mule on the way down the trail prior to its arrival at Indian Gardens.

Again appellee, on page 8, referring to our contention that the jury must have given some weight to the evidence, says:

> "How can anyone determine whether or not any particular evidence makes an impression upon a jury? The Appellee has just as much right to argue that the jury did not consider this conversation at all, in arriving at their verdict . . ."

We submit that the conclusive presumption is that arriving at their verdict, the jury did consider all matters admitted in evidence before them.

It is, therefore, respectfully submitted that the admission of the evidence of these conversations was not only erroneous, but was prejudicial and requires a reversal of the judgment.

III.

Error in the Instructions to the Jury.

We confess that we find it very difficult to follow appellee's argument upon this point. Appellee says, page 2, Reply Brief, that we assert that the owner of a horse or mule, hiring it to another, is not an insurer. We do so assert. Appellee then continues that because we objected to an instruction containing this language, we are on both sides of the fence. It is true that we did object to such an instruction containing this statement, but the objection was limited to that part hereof which stated that the plaintiff did not assume any risk proximately caused by negligence upon the part of the defendant. Appellee continues that had we merely objected to this latter part of the instruction, the court might have agreed with us. This is precisely what defendant's counsel did do. The objection was solely and specifically to that latter part of the instruction [288, 290; 307-308]. Apparently we did exactly what appellee would have us do.

Appellee then says, page 3, Reply Brief, "if appellant accepts a portion of a statement by admitting it, mustn't he accept the balance—when he does protest it?" It is certainly a novel proposition that one accepts the whole of a statement because he agrees with part thereof and protests against the rest.

Appellee continues, page 3, Reply Brief, "the balance of the criticized instruction is the same as the question of whether 'Chiggers' was unfit for the purpose." We do not understand what appellee means. The balance of the criticized instruction dealt with the question of the assumption of risk by the plaintiff if, in fact, the mule were not fit for the purpose for which it was hired.

Appellee then, on page 3, refers to the testimony of Mr. Ennis, that when a mule has been on pasture all winter without shoes, he is too soft to make the round trip up and down the Canyon in one day, so that he is put on a two day trip. Appellee then draws the remarkable conclusion from this testimony that "Chiggers" was too soft to make half a trip in half a day. We utterly fail to see how this would follow from Mr. Ennis' testimony.

Appellee then says, on page 4, Reply Brief, that no one disputes the fact that "Chiggers" did not stay in line as a mule was intended to do, nor that Mr. Mateas could not handle it, nor that mules were attempted to be changed at Indian Gardens—for some reason.

There appears to be no doubt but that Mr. Mateas did get upon Mr. Boles' mule at Indian Gardens. However, we emphatically dispute that "Chiggers" did not stay in line as he was intended to do, or that Mr. Mateas could not handle him. Even if the testimony of appellee was sufficient to support a finding that "Chiggers" did not stay in line and that appellee could not handle him, nevertheless Robert Ennis, the guide, testified that at practically all times coming down the trail he could see the entire party and that he observed nothing unusual about "Chiggers" up to Indian Gardens and received no complaints about him there. He further testified that after leaving Indian Gardens he noticed nothing unusual about the mule, but that the mules do stay as close together as they can, and that some will put their heads right up behind the other mules' rear ends and sometimes walk along in that fashion [242-243, 246].

Apparently appellee's next reference to the criticized instruction commences on page 10 of the Reply Brief where appellee argues that he did not assume any risk.

Since it was appellee's own testimony that before reaching Indian Gardens he knew that the mule was unsafe and that he was unable to handle it, the question was one of fact for the determination of the jury as to whether or not by continuing on that mule after Indian Gardens, appellee had assumed the risk incident thereto.

The trial court instructed the jury that as a matter of law appellee had not assumed that risk if the original furnishing of the mule to him amounted to negligence upon the part of appellant.

On the other hand, it is our contention that even though the furnishing of the mule amounted to negligence, if appellee, with full knowledge of the danger of riding that mule, nevertheless, continued on the mule after he had an opportunity to refuse so to do, then he assumed the risk incidental thereto.

It is our contention that the cause of the danger, whether due to negligence or not, becomes immaterial as soon as the person exposed to that risk becomes aware of its existence and has an opportunity to avoid it. We submit that where a person voluntarily continues to submit himself to a known danger, he cannot excuse his conduct on the ground that that known danger had been caused by the negligence of another.

Finally appellee says, page 16, Reply Brief, that our position is that "he assumed every risk which ever could be thought of in connection with riding a mule; particularly the risk of being bucked off after rest at Indian Gargens, or any other time."

Of course, this is not our position. We do not claim that appellee assumed any risk except those risks of which

he had or should have had knowledge. It is further our position that it was a question for the jury to have decided whether or not by the time he reached Indian Gardens appellee had knowledge of sufficient facts so that he must be considered as having assumed the risk incident to proceeding further on the particular mule.

We submit that the instruction given by the trial court was erroneous and that had it not been given, then the jury might well have returned a different verdict. Therefore, we submit that the giving of this instruction constituted prejudicial error.

IV.

Conclusion.

We again respectfully submit that the trial court committed reversible error in the admission of the testimony of the conversations between appellee and Mr. Boles not shown to have been within the hearing of any employee of appellant.

We also submit that the trial court committed reversible error in instructing the jury that appellee did not assume any risk which was proximately caused by negligence on the part of the defendant.

It is, therefore, submitted that the judgment in this case should be reversed.

Respectfully submitted,

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